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4 **IN THE UNITED STATES DISTRICT COURT**  
5 **FOR THE DISTRICT OF ARIZONA**  
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7 Geoffrey A Thomas,  
8 Plaintiff,  
9 v.  
10 Jeffery Shields, et al.,  
11 Defendants.  
12

No. CV-22-00257-TUC-JCH

**ORDER**

13 Before the Court is Plaintiff's "Motion for Sanctions or, in the Alternative, To  
14 Compel Defendants' Depositions" ("Motion") filed under Federal Rules of Civil Procedure  
15 30 and 37. Doc. 38. Plaintiff asserts that Defendants have twice failed to appear for their  
16 properly noticed depositions. *Id.* at 1. Plaintiff requests that the Court (1) strike Defendants'  
17 answer and enter default against them; (2) in the alternative, order Defendants to appear  
18 for their depositions in Tucson, Arizona on or before June 28, 2023, with the sanction of  
19 default if they fail to do so; and (3) order Defendants to pay Plaintiff's attorneys' fees caused  
20 by Defendants' failure to appear for their depositions. *Id.* Defendant Jeffery Shields filed a  
21 response and declaration in opposition.<sup>1</sup> Plaintiff filed a Reply. Doc. 42. For the following  
22 reasons, the Court will grant the Motion.

23 **I. Motion to Compel**

24 **A. Legal Standard**

25 In general, parties may obtain discovery regarding any matter, not privileged, that

26 <sup>1</sup> The Response bears the names of both Jeffery Shields and Terel Shields. Both defendants are  
27 proceeding pro se. The Court has previously admonished the Defendants that while a party may  
28 represent himself and manage his own case in federal court, *see* 28 U.S.C.A. § 1654, "[i]t is well  
established that the privilege to represent oneself ... is personal to the litigant and does not extend  
to other parties or entities." *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008). *See*  
Doc. 17 at 1 n.3. As such, Defendant Terel Shields did not file a Response.

1 is "relevant to any party's claim or defense and proportional to the needs of the case." Fed.  
2 R. Civ. P. 26(b)(1). Factors to consider include "the importance of the issues at stake in the  
3 action, the amount in controversy, the parties' relative access to relevant information, the  
4 parties' resources, the importance of the discovery in resolving the issues, and whether the  
5 burden or expense of the proposed discovery outweighs its likely benefit." *Id.* An item need  
6 not be admissible in evidence to be discoverable. *Id.* One of the available discovery tools  
7 is a deposition. "A party may, by oral questions, depose any person, including a party  
8 without leave of court," except that leave is required under certain circumstances not  
9 present here. Fed. R. Civ. P. 30(a)(1).

10 A motion to compel discovery is appropriate when a party refuses to engage in or  
11 produce discovery. *See* Fed. R. Civ. P. 37(a)(2). The movant must certify that he or she has  
12 in good faith conferred or attempted to confer with the party failing to make discovery to  
13 secure information or material without court action. *See* Fed. R. Civ. P. 37(a)(1). The court  
14 also may award sanctions if a party "fails after being served with proper notice, to appear  
15 for that person's deposition." Fed. R. Civ. P. 37(d)(1)(A). "A motion for sanctions for  
16 failing to answer or respond must include a certification that the movant conferred or  
17 attempted to confer with the party failing to act in an effort to obtain the answer or response  
18 without court action." Fed. R. Civ. P. 37(d)(1)(B).

### 19 **B. Analysis**

20 The discovery sought by Plaintiff—the Defendants' deposition—is relevant to the  
21 claims and possibly the defenses in this action and proportional to the needs of the case.  
22 *See* Fed. R. Civ. P. 26(b)(1). Defendants have twice failed to appear for their scheduled  
23 and properly noticed depositions. On March 13, 2023, Plaintiff filed and served notices for  
24 both Defendants' depositions to occur in Tucson, Arizona, on April 25, 2023. Docs. 29, 30.  
25 Defendants had six-weeks' notice. *Id.* In the interim, Defendants did not object or seek a  
26 protective order. *See generally*, Dckt. Defendants did not appear and claimed they were in  
27 the process of retaining legal counsel. On May 1, 2023, Plaintiff filed and served amended  
28 notices for both Defendants' depositions, setting the depositions for May 11, 2023, in

1 Tucson, Arizona. Docs. 35, 36. Again, Defendants did not object to the notices or seek a  
2 protective order. *See generally*, Dckt. Defendants did not appear and claimed Defendant  
3 Terel Shields fell ill from food poisoning. Doc. 39-1 at 3.

4 It does not appear to the Court that Defendants are operating in good faith.  
5 Defendants unilaterally postponed their scheduled depositions with little or no warning. In  
6 both instances, Defendants failed to provide alternative dates or arrangements. For  
7 example, *two days before* the April 21, 2023 deposition, Defendants stated, "[w]e fully  
8 intend to retain counsel now to attend the depositions with us . . . ." and later, "[o]ur lawyer  
9 is undertaking conflict checks and will be writing to you this week to reschedule  
10 depositions." Doc. 38-1, Burstein Decl. ¶ 3, Ex. A, B. Defendants refused to tell Plaintiff's  
11 counsel the name of the lawyer they had supposedly retained, stating "[i]t is not wise for  
12 us to give you his name." *Id.* at Ex. B. In his response, Defendant indicates "[m]ultiple  
13 attorneys looked into assisting the defendants before ultimately deciding against it" without  
14 providing any further details or explanation. Doc. 39 at 6. On May 11, 2023, *the morning*  
15 *of* the second scheduled deposition, Defendants explained that "personal health  
16 circumstances" arose and prevented their attendance. Doc. 38-1, Burstein Decl. ¶ 10, Ex.  
17 D ("We had planned to inform you yesterday when the situation materialised [sic] but  
18 unfortunately was not [sic] in a position to do so."). In his Response, Defendant Jeffery  
19 Shields did not include proof of illness substantiating the "personal health circumstances,"  
20 proof of cancelled travel arrangements, such as airfare or lodging, or proof of consultation  
21 with any law firm. Defendants' actions appear dilatory.

22 Defendant Jeffery Shields argues that the depositions should be conducted remotely  
23 and disputes whether good faith requirements were met by Plaintiff's counsel. *See* Doc. 39.  
24 He asserts that the co-defendants are willing and able to attend their videoconference  
25 depositions on June 28. *Id.* Plaintiff has accommodated this request and noticed  
26 Defendants' videoconference depositions in Salt Lake City, Utah, on June 28, 2023. *See*  
27 Docs. 40, 41. A party's failure to attend his or her own deposition "is not excused on the  
28 ground that the discovery sought was objectionable, unless the party failing to act has a

1 pending motion for a protective order under Rule 26(c)." Fed. R. Civ. P. 37(d)(2).  
2 Defendant Jeffery Shields did not timely object to the location of their noticed depositions  
3 and may not do so now. Nor is the Court persuaded by the other arguments raised by the  
4 Defendant.

5 As such, Defendants must comply with Plaintiff's notice of deposition, appear as  
6 scheduled on June 28, 2023, and participate in good faith during the deposition. Defendants  
7 are cautioned that failure to attend the deposition will result in sanctions. Sanctions may  
8 include, but are not limited to: monetary sanctions, an order prohibiting Defendants from  
9 supporting or opposing designated claims or defenses, an order striking pleadings, and  
10 default. *See* Fed. R. Civ. P. 37(b)(2) and 37(d)(3).

## 11 **II. Motion for Attorneys' Fees**

### 12 **A. Legal Standard**

13 Rule 37(a)(5) provides that if a motion to compel is granted, or if the disclosure or  
14 requested discovery is provided after the motion was filed, "the court *must*, after giving an  
15 opportunity to be heard, require the party or deponent whose conduct necessitated the  
16 motion, the party or attorney advising that conduct, or both to pay the movant's reasonable  
17 expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P.  
18 37(a)(5)(A) (emphasis added). However, the rule also identifies three circumstances in  
19 which a court may decline to award fees despite granting a motion to compel: (1) if "the  
20 movant filed the motion before attempting in good faith to obtain the disclosure or  
21 discovery without court action"; (2) if "the opposing party's nondisclosure, response, or  
22 objection was substantially justified"; or (3) if "other circumstances make an award of  
23 expenses unjust." *Id.*

### 24 **B. Analysis**

25 Here, none of the exceptions are applicable. First, Plaintiff made multiple attempts  
26 to meet-and-confer with Defendants before filing the motion to compel. Second, the  
27 reasons for failing to appear are not substantially justified. Defendants did not timely object  
28 to the noticed depositions and offer no proof to substantiate their absences. As a result,

1 Plaintiff was needlessly forced to waste time and money in both rescheduling the  
2 abandoned depositions and litigating the motion to compel. Accordingly, under  
3 Rule 37(a)(5)(A), Plaintiff's request for attorney's fees, incurred in bringing the Motion is  
4 granted. Plaintiff is directed to submit his Application for Attorneys' Fees by June 28, 2023.

5 **III. Order**

6 **IT IS ORDERED GRANTING** Plaintiff's "Motion for Sanctions or, in the  
7 Alternative, To Compel Defendants' Depositions" (Doc. 38). Defendants shall appear at  
8 the scheduled deposition on **June 28, 2023**. Failure to do so will result in sanctions.

9 **IT IS FURTHER ORDERED AWARDING ATTORNEYS' FEES.** Plaintiff is  
10 directed to submit his Application for Attorneys' Fees, under Fed. R. Civ. P. 37(a)(5)(A),  
11 on or before **June 30, 2023**. Defendants shall file their respective Oppositions no later than  
12 21 days after service of the motion; and (3) Plaintiff shall file an optional Reply (no more  
13 than 5 pages) to the Oppositions no later than 14 days after service of the Oppositions.

14 Dated this 20th day of June, 2023.

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18 Honorable John C. Hinderaker  
19 United States District Judge  
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